RANDOLPH L. WU, SBN 78651
HELEN M. MICKIEWICZ, SBN 123184
ELLEN S. LEVINE, SBN 77173
GEOFFREY B. DRYVYNSYDE, SBN 139884
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Telephone: (415) 703-2047
Facsimile: (415) 703-2262

Attorneys for Defendants

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

NEXTEL OF CALIFORNIA, INC.,

Plaintiff,

v.

GEOFFREY F. BROWN, SUSAN P. KENNEDY, LORETTA M. LYNCH, MICHAEL R. PEEVEY, and CARL W. WOOD, in their official capacities as Commissioners of the California Public Utilities Commission,

Defendants.

No. SACV 04-1229 DOC (MCx)
Related Case: SACV 04-1139 DOC (MCx)

DEFENDANTS' MOTION TO DISMISS

Filed with:

Request for Judicial Notice

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on January 31, 2005, at 8:30 a.m., or as soon thereafter as counsel may be heard by the above-titled court, located at 411 West Fourth Street, Santa Ana, CA 92701, in the courtroom of Judge David O. Carter: DEFENDANTS WILL AND HEREBY DO MOVE, pursuant to Federal Rules of Civil Procedure ("FRCP") 12(b)(1) and 12(b)(6), for an order dismissing this action on the grounds: Defendants are immune from suit under the Eleventh Amendment to the United States Constitution; and Plaintiff has failed to state a claim for which relief can be granted, for the reasons detailed in the memorandum below.

This motion is based on this Notice of Motion and Motion; the Memorandum of Points and Authorities below; and Defendants' Request for Judicial Notice, filed separately herewith. This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on November 17, 2004.

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

This case is about rules ("the Rules") recently promulgated by Defendants' (the "CPUC" or "Commission") to protect every telephone customer's right to have complete and accurate information in writing about the terms and conditions of wireless services that carriers offer; the right to be protected from misleading information about the services offered, and from deceptive practices that cause the customer to buy unwanted services; and the right to fair practices governing billing, enforcement, and compliance with customer service agreements.[1]

Plaintiff in this action ("Nextel") – which offers wireless telephone services – in what only can be described as a "shotgun" approach to litigation, challenges each

[1] The Rules are embodied in the CPUC's General Order 168, Exhibit C to Defendants' Request for Judicial Notice ("RJN"), filed herewith.

and every rule. For example, Nextel contests basic disclosure rules that require carriers to inform customers of key service terms and conditions in a minimum 10-point type (Rules 1(h) and 3(e)) before customers sign a service contract, and to inform customers in writing and obtain their consent before carriers increase service charges in an existing contract. (Rule 8(a) & (b)). It contests rules that prohibit deceptive practices, such as enticing a customer unwittingly to authorize a new wireless service when filling out a sweepstakes entry (Rule 2(a) & (b)). It challenges rules that give customers reasonable grace periods before service is shut off, or before customers incur fees for untimely payment of their bill, or for canceling a new service because, for example, they discover coverage is inadequate (Rules 3(f), 7(a) and 9(a)). It takes issue with rules that protect customers from premature disconnection of service when customers dispute a bill (Rule 11).[2] In many cases, Nextel challenges rules that are identical or substantially similar to rules previously applicable.[3] In short, this case is about Nextel's desire to market services on the basis of potentially inaccurate and incomplete information, and then unilaterally to impose anti-consumer measures in customer agreements, or when customers have problems with their service. The upshot of Nextel's challenge is to eviscerate the consumer protection role that Congress expressly authorized for the states under the Communications Act, 47 U.S.C. §§ 332(c), 253(b) & (d).

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[2] Nextel also challenges rules mandated by state law that prohibit the unauthorized switching of a customer's service to another provider (slamming), or the unauthorized inclusion of charges for additional services (cramming). *See* Cal. Pub. Util. Code §§ 2889.5, 2890 & 2890.1; Complaint ¶¶ 63-68.

[3] *Compare, e.g.*, Rule 9 ("carriers shall provide notices in writing to subscribers whose payments are overdue not less than 7 calendar days prior to terminating service for nonpayment") (RJN Ex. C), with *Order Instituting Rulemaking re Competition*, 60 CPUC 2d 611, 649 (1995) ("Notices to discontinue service for nonpayment of bills shall be provided in writing . . . not less than 7 calendar days prior to termination").

II. FACTS AND PROCEDURAL HISTORY

Nearly a decade ago, as Congress opened telecommunication services to competition, the CPUC recognized that it was "imperative" that consumer protection "rules be in place to protect telecommunications consumers against unfair business practices, to assure they receive adequate ongoing disclosure of rates, terms, and conditions of service, and to provide for resolution of complaints." *Competition OII*, 60 CPUC 2d 611, 631 (1995). Congress recognized the same need for strong state consumer protection rules. *See Ting v. AT&T*, 319 F.3d 1126, 1141 (9th Cir. 2003) (the Act's regime based on market competition "depends in part on state law for the protection of consumers in the deregulated and competitive marketplace"). Despite this acknowledged need for regulation, wireless carriers have persistently maintained that no rules are needed and that competition alone will guarantee consumer protection. Defendants' Request for Judicial Notice ("RJN") Ex. A at 10. The CPUC's recent decision fining one wireless carrier, Cingular, $12 million for marketing abuses is just one example that belies the carriers' position, and validates the views of both the federal and state governments. *See In re Pac. Bell Wireless*, 2004 Cal. PUC LEXIS 453 (Sept. 23, 2004).[4]

Since 1996, wireless carriers in California have been required to adhere to CPUC-approved consumer protection rules that previously appeared in their tariffs. *See, e.g., Investigation Into Mobile Tel. Serv.,* 70 CPUC 2d 61, 73 (1996). These rules were to remain in effect until the CPUC adopted a uniform set of protection rules governing wireless services. *Id*. In the decision that promulgated the Rules at issue here, however, the CPUC recognized the continuing need to "find new methods to protect consumers" in light of the "ongoing shift to a more competitive

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[4] *See also UCAN v. Pac. Bell*, CPUC D.02-02-027, 2002 Cal. PUC LEXIS 189 (Feb. 7, 2002), fining PacBell $15 million for marketing abuses, including incomplete disclosure and deceptive marketing; *Communications Telesystems Int'l v. CPUC*, 196 F.3d 1011 (9th Cir. 1999) (upholding CPUC decision fining and temporarily suspending service of long distance carrier).

telecommunications marketplace," and the potential for market abuse that exists in any market, regulated or fully competitive." RJN Ex. A at 3.[5] Thus, prompted by this recognition, as well as directives in sections 2896 and 2897 of the California Public Utilities Code, the CPUC began a multi-year proceeding to develop the Rules at issue here. RJN Ex. A at 3-8.

The Rules are the product of one of the most publicly-intensive and exhaustive processes in the Commission's history. Not only did that process produce an extensive and fully developed record upon which the Rules are based, but the CPUC was keenly responsive to the comments made, revising and refining its proposed Rules after dozens of opportunities for interested parties to be heard. RJN Ex. B at 39.

Specifically, in 2000, the CPUC began its proceeding by issuing a staff report, and inviting review and comment by all interested parties, including wireless carriers, on staff-proposed rules, holding workshops, public participation hearings, and affording numerous rounds of public comment. RJN Ex. A at 3. The CPUC subsequently held 20 public hearings in 13 locations throughout the state. *Id*. In June, 2001, Carl Wood, the lead Commissioner for the proceeding, issued proposed rules for public comment. He also held a four-day workshop, inviting all interested parties to provide further public input. Commissioner Wood thereafter released for another round of comments a workshop report which reflected changes to the proposed rules agreed to by both carriers and consumers. *Id*. at 6. On July 24, 2003, the CPUC further refined its proposed Rules, reflecting the comments received, and solicited additional public input. Responding to the comments raised, the CPUC then issued a revised set of Rules on which parties were again asked to comment. Parties were afforded yet another round of comment in March and April, 2004. *Id*. at 6-7.

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[5] The CPUC in particular cited the hundreds of complaints regarding prepaid calling cards, and is currently focusing on prepaid calling card abuse. RJN Ex. A at 53.

The CPUC issued its decision adopting the Rules on May 27, 2004. Several parties thereafter moved to stay its effect. On August 19, 2004, the CPUC denied the stay. At the same time, the CPUC stated that parties having difficulty meeting the deadlines for implementing individual rules could request an extension, and in fact has granted numerous requests. RJN Ex. B at 40-41. The carriers then sought rehearing of the CPUC's order. By operation of law, their rehearing applications were denied on September 7, 2004. This action soon followed. Subsequently, on October 7, 2004, the CPUC formally denied the applications for rehearing. RJN Ex. B.

III. ARGUMENT

A. Defendants Are Immune from Suit under the Eleventh Amendment

The Eleventh Amendment grants states immunity from suit in federal courts. Despite this immunity, plaintiffs, as here, sometimes attempt to sue a state by using the *Ex Parte Young* fiction of suing state officials, rather than the state itself. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 269, 117 S. Ct. 2028, 2034, 138 L. Ed. 2d 438 (1997). That exception to Eleventh Amendment immunity, however, is not absolute. *Id.*, 521 U.S. at 270. The *Ex Parte Young* exception does not apply where the suit is in reality against the state, and the relief sought would divest the state of important sovereign interests. *Id.* at 287. Such is the case here.

"The regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *Arkansas Elec. Co-op. Corp. v. Arkansas PSC*, 461 U.S. 375, 377, 103 S. Ct. 1905, 1908, 76 L. Ed. 2d 1 (1983). Such interests include, specifically, the interests the Rules are intended to protect: "[T]he important state interests . . . [in] the protection of consumers from unfair business practices, the compensation of those consumers for harm, and the need to ensure fair competition between, and the fitness to operate of, licensed carriers." *Communications Telesystems Int'l. v. CPUC*, 196 F.3d 1011, 1017 (9th Cir. 1999) ("*CTI*"). Even Congress has made clear that the protection of consumers

via regulation of the terms and conditions of wireless services is an area uniquely reserved to the states. *See* 47 U.S.C. § 332(c). Viewed more generally, the CPUC is concerned with the most fundamental of all government functions: ensuring justice by ensuring that citizens are treated fairly. *See United States. v. Edwards*, 152 F. Supp. 179, 180 (D.D.C. 1957). The Rules, as noted above, are intended to fulfill this fundamental governmental duty. *See, generally,* RJN Ex. A at 3-4.

In the typical case that falls well within the *Ex Parte Young* exception, a plaintiff seeks merely to prohibit particular conduct of a state official in alleged ongoing violation of federal law. *Cf. Goldberg v. Ellett*, 254 F.3d 1135, 1137 (9th Cir. 2001) (injunction to enjoin state official from collecting tax in alleged violation of discharge in bankruptcy). This, however, is not such a typical *Ex Parte Young* case. Instead, just as the plaintiff in *Coeur d'Alene* sought to divest the state of jurisdiction to regulate submerged lands, Nextel seeks to divest California of jurisdiction to regulate any and all aspects of wireless telecommunications services. Nextel does not just narrowly challenge the implementation of particular regulations. Instead, Nextel repeatedly challenges the Rules "as a whole," and argues that California has no authority to regulate any aspect of wireless telecommunication service, and no jurisdiction to protect California's consumers from abuses that the Rules are designed to prevent. *See, e.g.,* Complaint ¶¶ 2, 4, 45, 63-68. The Eleventh Amendment bars such an attempt – in federal court – to divest a state of its jurisdiction over an entire area of regulation. *See Sofamor Danek Group, Inc. v. Brown*, 124 F.3d 1179, 1184-85 (9th Cir. 1997) (as guided by *Coeur d'Alene, Ex Parte Young* doctrine applicable where plaintiff sought only "narrowly tailored" prospective prohibitory injunctive relief, and did not seek any "other relief which could arguably be held to implicate state policies and procedures"); *Duke Energy Trading & Mktg., L.L.C. v. Davis*, 267 F.3d 1042, 1053-54 (9th Cir. 2001) (in dictum: *Ex Parte Young* cannot be used to bring case to federal court where plaintiff seeks to "remove an entire area" of regulation from the state's jurisdiction).

B. Nextel's Preemption Claims Fail as a Matter of Law

State law may be preempted when (a) a federal statute expressly preempts state law; (b) where federal law is so pervasive that it occupies an entire field, leaving no room for state action; or (c) where state and federal law actually conflict. *See Ting,* 319 F.3d at 1135-36. Particularly where, as here, the state's police powers are challenged, congressional intent to preempt state law must be "clear and manifest," and if the Court has any doubts, they should be resolved against a finding of preemption. *Chevron U.S.A., Inc. v. Hammond,* 726 F.2d 483, 488 (9th Cir. 1984).

Under these standards, the CPUC's consumer protection rules easily pass muster. Federal law neither expressly preempts all state regulation, nor occupies the field of wireless telecommunication regulation. To the contrary, the Communications Act of 1934, 47 U.S.C. § 151 *et seq*., as amended, expressly authorizes state regulation in several sections. Section 332(c)(3)(A) authorizes states to establish terms and conditions for wireless services, other than those that directly regulate rates or market entry. 47 U.S.C. § 332(c)(3)(A). More generally, § 253(b) confirms state authority to safeguard the rights of consumers. 47 U.S.C. § 253(b). And section 601(c) of the Telecommunications Act of 1996 ("1996 Act") further provides a savings clause, stating, "This Act . . . shall not be construed to modify, impair, or supersede . . . State . . . law unless explicitly so provided." *See* Pub. L. No. 104-104, § 601(c)(1), 110 Stat. 143 (1996), *reprinted in* note to 47 U.S.C. § 152. Similarly, as detailed below, there is no actual conflict between federal law and any Rule Nextel challenges.

(1) The Rules do not conflict with a uniform federal scheme (Complaint Claim 1, ¶¶ 63-68)

Nextel asserts that federal telecommunications policy to promote national uniformity is so comprehensive that California's rules necessarily are preempted, because there is no room for state regulation. In fact, just the opposite is true. The federal scheme contemplates a dual system of regulation of wireless service,

requiring national uniformity of regulation in some areas, but reserving to states specific authority to regulate in other areas. *See generally* H.R. Rep. No. 103-111, at 260-61 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587-88 (discussing § 332(c)(3)(A)).

Section 332(c)(3) and its legislative history make clear that Congress, expressly intended to preempt state laws regulating wireless rates or entry. At the same time, however, Congress expressly confers on states authority to regulate "other terms and conditions" of wireless service. *Id.* In interpreting § 332(c)(3), the FCC itself has made clear that Congress' preference for market forces to shape the development of the industry is not "absolute" and Congress specifically chose not to "foreclose . . . state regulation." *In re Pet. of Ohio*, 10 FCCR 7842, ¶¶ 9, 44 (1995). Courts agree. *See GTE Mobilnet v. Johnson*, 111 F.3d 469, 480 (6th Cir. 1997); *Cellular Telecom. Indus. Ass'n v. FCC,* 168 F.3d 1332, 1335 (D.C. Cir. 1999).

The 1996 Act thereafter both maintained the dual regulatory framework in § 332(c), and reinforced the states' important role to protect consumers and to ensure reasonable terms and conditions of all telecommunications services, including wireless. Thus, while the 1996 Act was designed to promote competition, at the same time, Congress expressly understood that the Act's provisions fostering competition "depend[] in part on state law for the protection of consumers in the deregulated and competitive marketplace" and that state "consumer protection laws . . . form part of the competitive framework to which the FCC defers." *Ting*, 319 F.3d at 1141, 1145; *In re Pet. of Calif.*, 10 FCCR 7386, ¶ 108 (1995) ("unreasonable business practices can and do arise in competitive markets"). Specifically, Congress added section 253(b), and made manifestly clear that "[n]othing in this section [governing state regulatory authority] shall affect the ability of a State . . . to impose requirements necessary to protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." 47 U.S.C. § 253(b). Congress also added section 601(c) to make clear its intent not to occupy

the field, and to limit the preemptive effect of the Act only to those specific areas where the intent to preempt is express, stating, "This Act . . . shall not be construed to modify, impair, or supersede . . . State . . . law unless expressly so provided."

In short, Nextel's idea of a federal scheme that is so pervasive that it leaves no room for state regulation – something Nextel may wish for – bears no relationship to reality.

(2) Express Preemption Re: Rates (Complaint Claim 2, ¶¶ 69-79)

Nextel contends that even if federal law does not preempt all state regulation, certain of the Rules are preempted by § 332(c)(3)(A), which prohibits state regulation of wireless rates. To run afoul of § 332, however, a state consumer protection rule must directly affect rates. Rate regulation does not occur when state consumer protection rules merely produce an "increased obligation" on the wireless carrier that "could theoretically increase rates." *Brown v. Washington/Baltimore Cellular, Inc.*, 109 F. Supp. 2d 421, 423 (D. Md. 2000). "Congress did not preempt all claims that would influence rates, but only those that involve the reasonableness or lawfulness of the rates themselves." *Id.*; *see also Phillips v. AT&T Wireless*, 2004 U.S. Dist. LEXIS 14544, at *36 (S.D. Iowa 2004) ("'rate' must be narrowly defined or there is no ability to draw a line between economic elements of the rate structure and normal costs of operating a telecommunications business").

The Act's language further demonstrates that Congress intended only a narrow preemption of state authority. Section 332 only denies states authority "to regulate" rates and entry. It does not use broader language, such as the prohibition on states' enacting or enforcing laws "relating to" rates, as is contained, for example, in the Airline Deregulation Action of 1978, 49 U.S.C.App. § 1305(a), or the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a). *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 112 S. Ct. 2031, 2038, 119 L. Ed. 2d 157, 168 (1992) (statutes that are "designed to pre-empt state law in . . . a limited fashion" will

forbid states "to '*regulate*' rates"). The theory that other aspects of wireless service should be conflated into the concept of "rates" has been criticized since its initial development. *See, e.g., Spielholz v. Superior Court*, 86 Cal. App. 4th 1366, 1370, 104 Cal. Rptr. 2d 197, 201 (2001) (criticizing *Bastien v. AT&T Wireless Serv., Inc*, 205 F.3d 983 (7th Cir. 2000)).

Nextel's attempt to characterize the Rules as setting the price of wireless services misunderstands the Rules' nature and effect. The challenged Rules simply require companies to make meaningful disclosures to their customers; use conscionable contracting practices; adopt fair billing and collection techniques; offer refunds if they secure advance payment for services they do not provide; and provide customers who sign long-term contracts a rescission period – at any rate the carriers may choose. *See* Rules 1(b), 1(h), 3(f), 5(c), 7(a), 7(b), 7(d), 8(a), 8(b), 9(a), and 11(b). Each of these Rules is discussed below.

Rule 1(b) requires carriers to post their key rates, terms and conditions on their websites. Rule 1(b) is a pure disclosure rule. Disclosure is not rate regulation; arguments that disclosure rules amount to rate regulation have been rejected by the FCC. *In re Wireless Consumers Alliance Inc*., 15 FCCR 17,021, ¶¶ 14, 20 (2000). Nextel claims that this measure restricts its freedom to establish its own rates. Complaint ¶ 73. Not so. The text of the rule requires only that whatever rates Nextel establishes be published.

Rules 9(a) and 11(b) prohibit carriers from terminating service to customers for non-payment absent seven calendar days' notice, and govern the manner in which termination may be accomplished. Nextel baldly asserts that these rules amount to "regulation of . . . rates." Complaint ¶ 77. These Rules do not regulate rates. They require only that customers receive notice before their service is disconnected, and thus constitute permissible regulation of "other terms and conditions" of service.

Nextel also challenges Rules 8(b) and 1(h) as impermissible rate regulation. These rules, however, pertain to basic contract law, not rate regulation, and prevent

carriers from making unilateral contract changes, or from altering contract terms without notice to the other party. Carriers may establish whatever rates they choose. What a carrier may not do is create an unconscionable contract with its customer where the customer is forced to choose between accepting unilaterally imposed price increases or paying a termination fee to cancel the contract. The Rules only require carriers to honor the terms of their own contracts, or to obtain agreement to amendments – something the common law requires of most contracting parties. Although these contracts include price terms, that fact is insufficient to make the Rules impermissible.

Similarly, Rule 8(a) requires carriers to give a 25-day notice before making a unilateral change on non-term contracts, so that carriers cannot, for example, tell customers on January 31 that their rates are doubling on February 1. The Rule does not dictate rates but simply notifies a consumer of contract terms sufficiently before the change takes effect so that the consumer can meaningfully choose whether to continue the service. Unless carriers tend to make instantaneous decisions regarding rate changes – with no planning – all the Rule requires is that the carriers notify customers of their plans 25 days in advance of implementing them.

Nextel also challenges Rule 3(f), which applies to early termination fees in long-term contracts. This Rule, too, however, simply ensures fairness with respect to enforcement of contractual provisions; it does not dictate rates. This Rule allows subscribers to cancel any new service within 30 days without termination fees or penalties, such as when the geographic service coverage is inadequate. Such early termination fees are not rates, but rather are akin to a liquidated damages provision and thus constitute "other terms and conditions." *See, e.g., Esquival v. Southwestern Bell Mobile Systems, Inc.*, 920 F. Supp. 713, 715 (S.D. Tex. 1996)*; Iowa v. United States Cellular Corp*., 2000 WL 33915909, at *3-6 (S.D. Iowa 2000); *Phillips*, 2004 U.S. Dist. LEXIS 14544, at *36; *see also Brown*,109 F. Supp. 2d at 423 (state consumer protection rules are preempted only when they challenge the

reasonableness or the lawfulness of the rates themselves"). That early termination of service might cost carriers money that they may want to recover does not convert a termination penalty into a rate. As the *Phillips* court noted, "'rate' must be narrowly defined or there is no ability to draw a line between economic elements of the rate structure and normal costs of operating a telecommunications business that have no greater significance than as factors to be considered in determining what will ultimately be required of rates to provide a reasonable return on the business investment." *Phillips*, 2004 U.S. Dist. LEXIS 14544, at *36.[6]

Rule 5(c) requires that deposits to establish service earn not less than simple annual interest "based on" the three-month financial commercial paper rate. The Rule does not regulate the size of deposits that a carrier can require, nor does it require a carrier to pay the interest due on the deposit out of its own monies. A carrier could easily deposit the money into an interest-bearing account, and pay the customer the interest. The Rule further does not fix a precise interest rate, but rather requires interest "based on" the commercial paper rate. Nextel's bald allegation that Rule 5(c) constitutes rate regulation because it "limits the use of charges" is baseless. Complaint ¶ 76. In addition to being factually incorrect, this unsupported contention is belied by authority establishing that billing matters are distinguishable from rates. *See Brown*, 109 F. Supp. 2d at 423; *Fedor v. Cingular Wireless*, 355 F.3d 1069, 1074 (7th Cir. 2004).

Finally, Nextel characterizes Rules 7(a), (b) & (d) as rate regulation, but these Rules relate to billing, and not to rates. Rule 7(a) prevents late-payment penalties from exceeding 1.5% per month on an overdue balance. Rule 7(b) requires carriers to bill their customers promptly. And Rule 7(d) states the unremarkable requirement

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[6] Moreover, carriers have complete freedom to use termination fees to "lock in" customers, for example, customers who would prefer to terminate a contract early to take advantage of a competitor's better price or quality of service. All the Rule prohibits is assessing such fees within the first 30 days of service.

that "[b]ills must be based on the rates in effect at the time the service was used." Carriers cannot raise their rates and then apply the new rate retroactively to services already used.[7] This type of regulation – of billing practices – is not preempted by the Act. *See* H.R. Rep. 103-111, at 261, 1993 U.S.C.C.A.N. 378, 588 ("It is the intent of the Committee that the states still would be able to regulate . . . such matters as customer billing information and practices and billing disputes and other consumer protection matters"). Rules relating to late fees pertain to contract penalties, not rates. *See Brown,* 109 F. Supp. 2d at 423 ("While rates of service reflect a charge for the use of cellular phones, late fees are a penalty for failing to submit timely payment"); *Ball v. GTE Mobilenet of Calif.,* 81 Cal. App. 4th 529, 538-39, 96 Cal. Rptr. 2d 801, 807-08 (2000) (late fees not analogous to the types of practices that courts have concluded are part of a carrier's "rate structure," such as charging for whole-minute increments ("rounding up"), or charging for incoming calls). Similarly, rules relating to the timing of bills pertain to contractual issues, and do not constitute rate regulation. *See Fedor,* 355 F.3d at 1074 (state not preempted from addressing whether "carrier improperly attributed calls made in one month to the call-time for a different month").

(3) Express Preemption Re: Barriers to Entry (Complaint Claim 1, ¶ 66.)

Besides challenging numerous specific rules as allegedly rate regulation prohibited by § 332(c)(3)(A), in one paragraph of its first claim (¶ 66), Nextel contends that the Rules, "taken as a whole," violate § 332(c)(3)(A)'s clause that says that states may not "regulate the entry" of carriers into a market. Nextel argues that the Rules run afoul of this provision because carriers cannot offer service in California without complying with the Rules.

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[7] Contrary to Nextel's claims, these Rules do not regulate how much a carrier can charge for roaming and other services. Complaint ¶ 76. They simply require wireless providers to render bills within three or four months from the time services were used.

This argument is entirely specious. The mere fact that a carrier must comply with some rules does not magically convert the rules into prohibitions on, or regulations of, entry. If accepted, it would mean that any and every rule a state enacts constitutes a prohibited barrier to entry. Such an interpretation of the law would render nugatory § 332's express grant of authority to the states to regulate terms and conditions of service. The Ninth Circuit agrees, and has rejected the very argument Nextel makes: "The Act was designed to prevent *explicit* prohibitions on entry by a utility into telecommunications, and thereby to protect competition in the industry while allowing states to regulate to protect consumers against unfair business practices . . . ." *CTI*, 196 F.3d at 1017 (emphasis added).[8] And the FCC concurs that § 332 does not bar measures that merely "make it more difficult for some carriers to offer service" even though such rules could be characterized as indirect entry regulations. *In re Federal-State Joint Bd. on Universal Serv.*, 15 FCCR 12,208, ¶ 110 (2000). "This is true of many of the requirements that Congress intended to include within 'other terms and conditions' of service." *In re Pittencrieff Comm., Inc.*, 13 FCCR 1735, ¶ 22 (1997).

(4) Recovery of Federally-Mandated Fees (Complaint Claim 2, ¶ 74)

Nextel alleges that Rules 1(h) and 8(b) are preempted because they purportedly prevent carriers from recovering certain federally-mandated fees. This allegation was rendered moot shortly after Nextel filed its Complaint. On October 7, 2004, the CPUC modified both Rules to permit carriers to collect "the actual amount of any increase in mandated government charges." RJN Ex. B at 42 (ordering para. 1(c)).

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[8] Although *CTI* was concerned with § 253's preemption of state regulations constituting barriers to entry, that section, which provides, in relevant part that no state "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," is at least as broad, if not broader, than § 332.

C. Nextel Has Failed to State a Claim for Which Relief May Be Granted with Respect to Its Constitutional Claims

(1) First Amendment (Complaint Claim 4, ¶¶ 87-94)

Nextel argues that certain Rules violate its First Amendment rights. Specifically, Nextel challenges Rules 1(b) and 6(k), which require disclosure of truthful information to consumers, such as the terms, conditions, and rates of service they offer, and other consumer-related information, such as how to contact the CPUC or FCC, so consumers can seek assistance in resolving complaints or disputes. *See, e.g.*, Rule 6(k), RJN Ex. C.

These rules pertain to purely commercial speech. Moreover, they only mandate disclosure of truthful and accurate information; they do not restrict speech. Such rules, which compel "purely factual and uncontroversial information," must be sustained "if they are reasonably related to the State's interest in preventing deception of consumers." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985).

Nextel fails even to allege that the Rules do not satisfy this standard. Instead, Nextel alleges that the Rules run afoul of the First Amendment because they do not "directly advance[] a substantial government interest," and are "broader or more burdensome than necessary to achieve that interest." Complaint ¶ 99. These allegations recite the wrong standards – standards relating either to *restrictions* on commercial speech, or to mandated *political* speech. *See Zauderer*, 471 U.S. at 651; *Nat'l Elec. Mfg's Ass'n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001) (distinguishing standards). Because the Complaint does not allege any violation of the First Amendment under the proper standard of review, it fails to state a claim and must be dismissed. *Associated Gen. Contractors v. Calif. State Council of Carpenters*, 459 U.S. 519, 526, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983) (It is improper "[to] assume that [plaintiff] can prove facts that [she] has not alleged").

Moreover, there can be no question that the Rules satisfy the correct standard. *Zauderer* recognizes that there is a legitimate state interest in preventing deception of consumers. *Zauderer*, 471 U.S. at 651. Thus, the only potential issue here is whether the Rules are "reasonably related" to that interest. *See id.* Giving consumers accurate information regarding how to contact regulatory agencies to obtain help in resolving disputes undoubtedly promotes consumer protection. Posting key rates, terms, and conditions so that consumers know what they are buying, or so that consumers easily can learn what their existing agreements require, also is self-evidently reasonably related to consumer protection.[9]

(2) Contracts Clause (Complaint Claim 6, ¶¶ 101-106)

To establish a claim under the Contracts Clause, Nextel must show that the challenged Rules (1) substantially impair a contract; (2) that the state lacks a significant and legitimate public purpose behind the Rules; and (3) that the Rules are not "based upon reasonable conditions and [are] of a character appropriate to the public purpose justifying the [rules'] adoption." *Rui One Corp. v. City of Berkeley*, 371 F.3d 1137, 1147 (9th Cir. 2004). Nextel fails to allege, and indeed cannot allege, facts to support any of these factors.

Where the state satisfies the second factor, and has a "significant and legitimate public purpose[]," a Contracts Clause claim necessarily fails, and a court need not even reach the other two factors. *See Snake River Valley Elec. Ass'n v. Pacificorp.*, 357 F.3d 1042, 1051 n.9 (9th Cir. 2004). Such is the case here. The purpose of the Rules is to protect consumers. *Order Instituting Rulemaking re Consumer Rights,* CPUC R.00-02-004, 2000 Cal. PUC LEXIS 97, at *1-2 (Feb. 3, 2000). Consumer protection is, as a matter of law, a "significant and legitimate public purpose." *CTI*,

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[9] The importance of maintaining access to these rates, terms, and conditions is heightened in light of Nextel's contention that the Rules that require it to give customers notice before Nextel unilaterally changes contract terms are unconstitutional.

196 F.3d at 1017. Accordingly, the Rules survive Contracts Clause scrutiny as a matter of law.[10]

Even if the existence of a significant purpose were not fatal to Nextel's claims, Nextel still could not succeed, because it cannot show substantial impairment. To show substantial impairment, it is not sufficient to show that a regulation alters just any part of a contract, which is all Nextel alleges. *City of El Paso v. Simmons*, 379 U.S. 497, 507, 85 S. Ct. 577, 587, 13 L. Ed. 2d 446 (1965). Rather, the regulation must go to the heart of provisions that "substantially induced" a party "to enter into [the] contract," or whether it has the nature of "the central undertaking" or "primary consideration" of the parties. *Id.*, 379 U.S. at 514. Nextel's own Complaint reveals that it cannot satisfy this burden.

For example, Nextel alleges that Rule 5 purports to alter contractual provisions governing interest on deposits. Complaint ¶ 103. Yet relevant provisions of Nextel customer agreement acknowledge that interest will be paid as "required by applicable law." RJN Ex. J ¶ 1. Rule 5 does nothing to alter or even affect this provision; it simply states what *is* required by law. Consequently, Nextel fails to state a claim with respect to this Rule. *See Rui One*, 371 F.3d at 1147 (there must be "contractual agreement regarding the specific terms allegedly at issue").

Similarly, Nextel challenges Rule 11, which requires carriers to follow certain procedures in the event of a billing dispute. Rule 11, however, merely requires carriers to investigate complaints, and to refrain from imposing late fees or terminating service during the pendancy of a billing dispute. *See* RJN Ex. C. The dispute resolution provisions of Nextel's customer agreement do not pertain to any of

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[10] Nextel's argument that the rules do not promote a "broad societal interest" is without merit. A rule is not invalid just because it benefits a particular group of consumers, rather than every citizen in the state. *See Campanelli v. Allstate Life Ins. Co.*, 322 F.3d 1086, 1099 (9th Cir. 2003) (statute reviving insurance claims for earthquake damage served legitimate purpose to "bring needed relief to the victims of the Northridge earthquake").

these issues. *See* RJN Ex. J ¶ 16. Instead, the agreement requires customers to engage in binding arbitration – a requirement that is in no way altered by the challenged Rule.

The remaining challenged Rules (1(h), 2(c), 3(e)&(f), 8(e), 7(a), 8(b) and 9) are self-evidently ancillary to the main purpose of the contracts, and address peripheral issues such as the size of the type-face for certain contract provisions, the time during which a new subscriber may cancel service without incurring a penalty; procedures for terminating a subscriber's service for non-payment; and interest on deposits. They simply are not central elements of the agreement, as required to show substantial impairment. *See El Paso*, 379 U.S. at 514.

Further reducing the substantiality of any impairment are three other salient facts. First, the telecommunications industry has been regulated in the past (*see, e.g.*, Section II, above), thus reducing the legal significance of any alteration of contractual terms for Contracts Clause purposes. *See Campanelli v. Allstate Life Ins. Co.*, 322 F.3d 1086, 1098 (9th Cir. 2003). Second, the challenged rules do not completely invalidate contractual provisions, they simply modify them. *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977) (distinguishing between laws that "merely modify" contractual terms and those that "totally eliminate" important provisions). For example, Rule 9 does not prohibit carriers from terminating service for non-payment, it only requires carriers to follow certain procedures in order to protect consumers from arbitrary or improper termination. Rule 3(f) specifies a 30-day period in which a new customer may cancel service without incurring a termination fee, rather than some other period; and Rule 5 affects only the amount of interest on deposits. Rule 7 does not prohibit late payment fees and roaming charges; it only specifies how and when they be charged. Rule 8 does not prohibit any changes to contracts; it only restricts Nextel's ability to make *unilateral* changes. Third, the contracts acknowledge that they are subject to state

law. RJN Ex. J, ¶ 17. Such a provision militates against any finding of substantial impairment. *See Rui One*, 371 F.3d at 1150.

Finally, Nextel cannot satisfy the last factor. As noted in Section II, above, the CPUC found that the challenged rules are important to protect consumers. When a state acts to impair private contracts, "courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *United States Trust*, 431 U.S. at 23.

(3) Commerce Clause (Complaint Claim 3, ¶¶ 80-86)

Nextel argues that Rules as a whole violate the Commerce Clause, because they (1) "will oblige Nextel and other wireless carriers to impose many of California's requirements nationwide;" (2) "subject carriers to multiple inconsistent state regulatory schemes;" and (3) "impose an undue burden on interstate commerce." Complaint ¶¶ 82-84. In essence, Nextel contends that because wireless services are not limited to wholly intrastate service, the Rules necessarily directly regulate or burden interstate commerce. This claim, however, has no merit.

The Commerce Clause does not, by its terms, prohibit states from enacting laws that directly regulate or otherwise affect interstate commerce. Instead, it merely grants Congress authority to regulate interstate commerce. U.S. Const. Art. I § 8, cl. 4. However, this "affirmative grant of authority to Congress also encompasses an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce." *Healy v. Beer Institute*, 491 U.S. 324, 326, n.1, 109 S. Ct. 2491, 2494 n.1, 105 L. Ed. 2d 275 (1989). That is, because the Constitution gives Congress authority to regulate interstate commerce, states are prohibited from enacting legislation that materially interferes with that authority.

In light of this rationale underlying the dormant Commerce Clause, Nextel's claim fails as a matter of law. Nextel's claim cannot succeed because Congress itself has expressly delegated to individual states authority to regulate the terms and

conditions of wireless service. *See* 47 U.S.C. § 332(c)(3)(A). That fact thus directly negates the contention that California's exercise of this authority interferes with Congress' commerce powers. *See White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204, 213, 103 S. Ct. 1042, 1047, 75 L. Ed. 2d 1 (1983); *Oxygenated Fuels Ass'n, Inc. v. Davis*, 163 F. Supp. 2d 1182, 1188 (E.D. Cal. 2001).

In any event, if the Rules plausibly could be alleged to interfere with interstate commerce, despite section 332(c)'s delegation of authority to the states, Nextel cannot establish that the Rules affect interstate commerce to the extent prohibited by the Constitution. In evaluating challenges to state regulation under the Commerce Clause, courts follow a two-tiered approach, and statutes will be struck down only if they directly regulate commerce, or when they indirectly burden commerce and the burden on interstate commerce clearly exceeds the local benefits. *See S.D. Myers, Inc. v. City and County of San Francisco*, 253 F.3d 461, 471 (9th Cir. 2001) (citations and quotations omitted). Nextel fails to, and cannot, allege facts that satisfy either standard.

(a) Direct Regulation of Commerce

Nextel's contention that the Rules run afoul of the Commerce Clause because they will force carriers to adopt California's rules nationwide appears to be an allegation that in doing so, the Rules purport to directly affect commerce. State laws that typically have been struck down as directly regulating interstate commerce, however, include laws that "[force] a merchant to seek regulatory approval in one State before undertaking a transaction in another," *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582, 106 S. Ct. 2080, 2086, 90 L. Ed. 2d 552 (1986); limit the rates that a company can charge for a product in another state, *see Healey, supra*; or regulate transactions that occur "wholly" in other states, *NCAA v. Miller*, 10 F.3d 633, 640 (9th Cir. 1993). The challenged Rules are of an entirely different ilk. They merely regulate, directly or indirectly, the terms and conditions of services offered, and the means of offering those services, by wireless carriers within

California; or they require disclosure of information about the services carriers offer. Such rules do not constitute direct regulation of interstate commerce. *See Gravquick A/S v. Trimble Navigation Intern. Ltd.*, 323 F.3d 1219, 1224-25 (9th Cir. 2003) (distinguishing, *e.g.*, *Healy*); *Nat'l Elec. Mfg's Ass'n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001).

(b) Indirect Regulation of Commerce

Nextel's challenge to the Rules on the ground that they indirectly, but unduly burden, interstate commerce, also lacks merit. Such challenges cannot succeed unless the challenger shows that the burden imposed is clearly excessive in relation to the putative local benefits. *See S.D. Myers*, 253 F.3d at 471. Nextel cannot succeed in this regard because courts have held that the sorts of burdens Nextel alleges are insufficient to sustain a Commerce Clause claim like the one Nextel makes. Nextel contends, for example, that imposing different rules in different states necessarily burdens interstate commerce, because Nextel will – "as a practical matter" – have to conform all its contracts in all states to California's rules. That sort of "burden" does not support a Commerce Clause claim. *See Sorrell*, 272 F.3d at 110. The fact that the Rules, by their terms, do not *require* the carriers to implement the Rules in all states is dispositive. *See id.* And the fact that setting up a separate system in California to comply with the Rules may cost the carriers money does not alter that conclusion. *See id.*

Nextel's allegations regarding burdens arising from potential conflicts between the Rules and the regulations in effect in other states also are legally inadequate to support a Commerce Clause claim. It is not enough to point to a risk of conflicting regulatory regimes in multiple states; there must be an actual conflict between the challenged regulation and those in place in other states. *See id*. at 112; *see also C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 406, 114 S. Ct. 1677, 1690, 128 L. Ed. 2d 399 (1994) (O'Connor, J., concurring) ("This is not a hypothetical

inquiry"). Nextel fails to allege any facts demonstrating an actual conflict, and thus fails to state a valid claim.

(4) Procedural Due Process (Complaint Claim 7, ¶¶ 107-111)

Nextel's contention that its due process rights were violated by being given one week to comment on the Rules, and being denied an evidentiary hearing, also is without merit. When an agency promulgates rules that apply to an entire class of entities, as here, there is no due process right to individualized notice, much less to a hearing, and "due process is satisfied when the legislative body performs its responsibilities in the normal manner prescribed by law." *Hotel Motel Ass'n of Oakland v. City of Oakland*, 344 F.3d 959, 969 (9th Cir. 2003). Here, applicable law required the CPUC to provide parties with seven days for comments. CPUC Rules of Practice and Procedure § 77.6(d); Cal. Pub. Util. Code § 1701. This is exactly the time afforded to Nextel.

Moreover, even if individualized process had been required, to state a claim, Nextel would have to show that it was prejudiced by the amount of notice afforded. *See S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 808 (9th Cir. 2002). Nextel's Complaint, however, is devoid of even a conclusory allegation of prejudice, much less allegation of any facts to support the conclusion. Furthermore, any such allegation would be belied by the fact that 33 parties, including Nextel, submitted comments – totaling hundreds of pages – within the time allotted. RJN Ex. D (entries dated May 20, 2004); c*f. Edison v. Lynch*, *supra*, (one-day notice to challenge billion-dollar settlement satisfied due process).

It also is worth noting that the Carriers were afforded an extraordinary amount of process. *See* Section II above. Moreover, the parties all were given an opportunity to comment on the CPUC's initial categorization of the proceedings as legislative (so that no hearings were required). RJN Ex. B at 39. "No carrier sought an evidentiary hearing on the consumer protection Rules, and in fact the wireless carriers association

("CCAC") stated that it had no objection to the preliminary scoping memo or the categorization of the proceeding." *Id.*

(5) Vagueness (Complaint Claim 5, ¶¶ 95-100)

"To bring a successful facial challenge [on the ground of unconstitutional vagueness] outside the context of the First Amendment, 'the challenger must establish that no set of circumstances exists under which the [rule] would be valid.'" *Hotel Motel Ass'n,* 344 F.3d at 971. "A statute is vague not when it prohibits conduct according to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Botosan v. Paul Realty*, 216 F.3d 827, 836 (9th Cir. 2000) (citation and quotation omitted). Thus, "[i]f it is 'transparently clear' that some particular conduct is restricted by the [rule], the [rule] survives a facial challenge on vagueness grounds." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 508, 102 S. Ct. 1186, 1198, 71 L. Ed. 2d 362 (1982) (White, J. concurring) (quotation omitted). Under these standards, the challenged Rules easily pass constitutional muster.

Nextel first alleges that "Rules 1(b), 1(d), 2(d), 3(e), 8(a), and 8(b), are rendered meaningless by their vagueness and ambiguity." Complaint ¶ 97. For Rules 1(d), 2(d), and 3(e), however, Nextel fails to identify a single term it finds vague. This constitutes a failure to state a claim. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) ("court [is not] required to accept as true allegations that are merely conclusory); *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957) (claim must give defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests").

Nextel specifically professes confusion regarding Rules 8(a) and 8(b), contending that they conflict, but omitting any allegations as to the nature of that conflict. Such a conclusory allegation is insufficient to state a claim. *See id.* In any event, it is impossible to see how the Rules possibly could conflict. Rule 8(a) applies

to "non-term contracts," whereas Rule 8(b) applies to term-contracts." RJN Ex. C. Those concepts are mutually exclusive, and are regularly used in statutes. *See, e.g.* Cal. Ins. Code § 10150.

Nextel also claims to be confused regarding the phrase "key rates, terms, and conditions," which is used in several rules, including Rule 1(b). That term, however, has perfectly defined core meaning in the Rules, which includes both a general definition, and numerous categorical examples. *See* RJN Ex. C. Such a definition, supported by examples, is constitutionally adequate, particularly where a rule requires flexibility. *See Botosan*, 216 F.3d at 836-37. Moreover, the CPUC expressly noted in its decision promulgating the rules that the carriers were expressly required to consider only those things listed in the examples as "key;" it "leaves it to individual carriers to fill in where there may be others equally important," so that there is no danger of the sort of prosecutions arising from some carrier's failure of imagination, as Nextel alleges. RJN Ex. A at 48.

In any event, if Nextel is genuinely confused about whether a specific rate, term, or condition of its contracts is "key," nothing in the Public Utilities Code or the CPUC's rules prevents Nextel from making an inquiry to the CPUC. That ability is fatal to all of Nextel's vagueness claims. *See Hoffman Estates*, 455 U.S. at 498 (strong presumption that regulations are not unconstitutionally vague if the regulated party has the means of obtaining clarification either by making inquiry or through an administrative process).

(6) Section 1983 (Complaint Claim 8, ¶¶ 112-117)

Having failed to state claims for any violation of federal law or of the Constitution, Nextel's § 1983 claim necessarily must be dismissed.

D. Claims Referring to Rules by "Example," or Prefaced by Terms Such as "For Example and without Limitation" Must Be Dismissed

A claim must give defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley*, 355 U.S. 41 at 47. Many of Nextel's claims

are sufficiently specific to the extent that they identify particular Rules and allege why Nextel thinks those Rules violate the Constitution. But in numerous cases, Nextel qualifies its recitation with phrases such as "for example and without limitation." *See, e.g.,* Complaint ¶¶ 72, 89, 97. Such claims do not satisfy even the minimal pleading standards of the Federal rules, and should be dismissed.

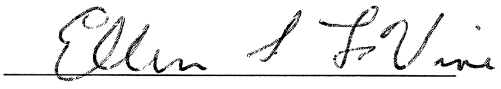
CONCLUSION

For the reasons explained above, the CPUC respectfully urges the Court to dismiss the Complaint with prejudice.

Dated: November 24, 2004

Respectfully submitted,

RANDOLPH L. WU
HELEN M. MICKIEWICZ
ELLEN S. LEVINE
GEOFFREY B. DRYVYNSYDE

By: 

ELLEN S. LEVINE

505 Van Ness Ave.
San Francisco, CA 94102
Phone: (415) 703-2047
Attorneys for Defendants